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In The

Supreme Court of the United States

No. 71-373

CITY OF VIRGINIA BEACH,
Appellant,
v.
HENRY E. HOWELL, JR., ET AL.,
Appellees.

and

CITY OF VIRGINIA BEACH,
Appellant,
v.
STANFORD E. PARRIS, ET AL.,
Appellees.

and

CITY OF VIRGINIA BEACH,
Appellant,
v.
CLIVE L. DuVAL, II, ET AL.,
Appellees.

On Direct Appeal from the United States District Court for the Eastern District of Virginia

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BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the District Court (J. App. 1-22) is reported at 330 F. Supp. 1138.[1]

[1] The material printed in the Joint Appendix filed with the jurisdictional statement has not been reprinted in the Appendix filed with this Brief. The Joint Appendix will be designated "J.App." and the Appendix filed with this Brief will be designated "App."

JURISDICTION

The three suits involved in this appeal were instituted in the United States District Court for the Eastern District of Virginia to test the constitutionality of the Acts of the General Assembly of Virginia reapportioning the State, as a result of the 1970 census, into districts for the election of members of the Senate and House of Delegates. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1343 (3) and 2201, and 42 U.S.C. §§ 1983 and 1988. Three-judge courts were convened to hear each of the suits, as required by 28 U.S.C. §§ 2281 and 2284.

The cases were consolidated for trial on June 16, 1971, and an opinion for the consolidated court was filed and an interlocutory order entered on July 2, 1971, declaring the Virginia reapportionment plan unconstitutional and substituting a court-prepared plan. The City of Virginia Beach sought a stay of this order and a new trial from Judge John A. McKenzie, which were denied on July 13. (J. App. 26-27). Virginia Beach filed a Notice of Appeal in all three suits in the United States District Court for the Eastern District of Virginia on July 15. (J. App. 47-48). An application for a stay was denied by Mr. Justice Black on July 27, 1971. 404 U.S. 1201. Virginia Beach filed its jurisdictional statement on September 13, 1971, and probable jurisdiction was noted on April 17, 1972. The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

The Virginia reapportionment plan overturned by the District Court is contained in Chapter 116, Acts of Assembly of 1971 (J. App. 27-30), setting forth a reapportionment plan for the House of Delegates, and Chapter 120, as

amended and re-enacted by Chapter 246, Acts of Assembly of 1971 (J. App. 31-43), setting forth a reapportionment plan for the Senate. Chapter 116 has been codified as *Va. Code Ann.* § 24.1-12.1 (Cum. Supp. 1971). Chapter 246 has not been codified, but Chapter 120 appears as *Va. Code Ann.* § 24.1-14.1 (Cum. Supp. 1971).

QUESTIONS PRESENTED

(1) Whether the standards for testing the constitutionality of congressional redistricting under Article I, § 2 as determined by this Court in *Wesberry* v. *Sanders, Kirkpatrick* v. *Preisler* and *Wells* v. *Rockefeller* should displace the standards set in *Reynolds* v. *Sims* for testing the constitutionality of state reapportionment under the Equal Protection Clause.

(2) Whether the slight deviation from mathematical equality in the General Assembly's reapportionment plan for the House of Delegates is justified to maintain the integrity of political subdivision boundaries in order to give the voters of political subdivisions a voice in at least one house of Virginia's legislature.

(3) Whether the District Court's reapportionment plan, which denies to certain political subdivisions representation in proportion to their population, submerges large numbers of Virginia Beach citizens in vast multimember districts for the election of members of both houses, and contains significant deviations from population equality among districts, is constitutional.

(4) Whether the District Court abused its power and discretion by ordering a reapportionment plan without giving the General Assembly any opportunity to revise its plan and without giving anyone an opportunity to be heard.

STATEMENT OF THE CASE

Pursuant to Article II, § 6 of the Constitution of Virgini of 1971, the General Assembly enacted Chapters 116 an 120, Acts of Assembly of 1971, on March 1, 1971, appo tioning the State into 52 districts for the election of th 100 members of the House of Delegates and 40 singl member districts for the election of members of the Senat

Three suits were thereafter instituted in the Unite States District Court for the Eastern District of Virgini attacking the constitutionality of these Acts. Two suit *DuVal* v. *Prichard*, filed in the Richmond Division (Civ Action No. 174-71-R) (App. 47-64), and *Parris* v. *Prichar* filed in the Alexandria Division (Civil Action No. 111-7 A) (App. 14-27), alleged that Northern Virginia wa underrepresented in the House of Delegates. The third sui *Howell* v. *Mahan*, filed in the Norfolk Division (Civil Ac tion No. 105-71-N) (App. 93-110) alleged that 36,69 naval personnel stationed at the Norfolk Naval Station, bu largely residing elsewhere, had improperly been placed i one senatorial district. The three suits were consolidate for trial and set for hearing on May 24, 1971, before fou judges, sitting as three Three-Judge District Courts.

Virginia Beach, a city with a 1970 population of 172,10 located adjacent to the City of Norfolk, intervened as party defendant in all three suits pursuant to Rule 24(a of the Federal Rules of Civil Procedure. Other intervenor included the City of Norfolk as a defendant and severa black citizens of the City of Richmond (William S. Thorn ton, et al.) who intervened as plaintiffs on behalf of them selves and all those similarly situated black residents o Virginia.

On May 7, 1971, the United States Attorney General acting pursuant to Section 5 of the Voting Rights Act o

1965, 42 U.S.C. § 1973(c), objected to the multimember House districts in five urban areas on the grounds of dilution of the black minority vote and objected to the line demarcating the boundary between the 5th and 6th Senatorial Districts in Norfolk on the ground that this contorted line may adversely affect the voting strength of blacks. (J. App. 51-53).

The hearing on May 24 was devoted to arguing the effect of the Attorney General's objection. The court thereupon entered an "Order on First Hearing" (J. App. 43-46) providing: (1) that the trial of the three suits be continued to allow Virginia an opportunity to obtain approval of a reapportionment plan from the United States Attorney General or the United States District Court for the District of Columbia, as provided in the Voting Rights Act, (2) that the primary elections originally set for June 8, 1971, be postponed until September 14, 1971, and (3) that the court would proceed with trial of the three suits and thereafter itself formulate a reapportionment plan resolving valid objections, if any, of the plaintiffs, unless prior to June 15, 1971, Virginia had submitted a reapportionment plan to the United States Attorney General for his approval or had sought a declaratory judgment from the United States District Court for the District of Columbia.

Before the June 15 deadline, this Court handed down its opinion in *Whitcomb* v. *Chavis,* 403 U.S. 124 (June 7, 1971). Thereupon, the Attorney General withdrew his objection to the reapportioment plan for the House of Delegates. (J. App. 53). On June 14, 1971, the General Assembly adopted Chapter 246, Acts of Assembly of 1971, which amended Chapter 120 to revise the line between the 5th and 6th Senatorial Districts, thereby eliminating the Attorney General's sole objection to the reapportionment plan for the Senate. (J. App. 54-55).

The three suits were heard by the consolidated District Court on June 16, 1971. The General Assembly was in session at the time, having postponed final adjournment for the sole purpose of remedying any aspects of its plan which might be invalidated by the District Court.[2] But without giving the General Assembly an opportunity to devise a plan acceptable to the court or requesting the parties to submit suggested plans, the court on July 2, 1971, filed an opinion (J. App. 1-22) and entered an interlocutory order (J. App. 23-25) reapportioning Virginia. As affecting Virginia Beach, the General Assembly's reapportionment plan and the modifications made by the District Court are as follows:

House of Delegates

(a) Under the General Assembly's reapportionment plan for the House of Delegates, Virginia Beach constituted the 40th House District and was allocated three delegates for its population of 172,106, or one delegate per 57,369 citizens. Since one House delegate should ideally represent only 46,485 citizens, the General Assembly created a floater district (the 42nd) comprising the cities of Virginia Beach, Portsmouth (population 110,963) in the 41st District and Chesapeake (population 89,580) in the 38th District.

(b) The District Court eliminated the 42nd House District, transferring its delegate to Northern Virginia. It then resolved the resulting underrepresentation of Virginia Beach by combining a portion of Virginia Beach with Norfolk. But instead of transferring to the 40th House District the 13,834 Norfolk citizens necessary to give Virginia Beach four delegates, the District Court transferred more than twice as many people—29,136—from Virginia Beach to Norfolk's 39th District to justify Norfolk's seven

[2] The General Assembly did not finally adjourn until July 8, 1971.

delegates. Further, under the court's plan these Virginia Beach citizens do not vote in a single-member district with Norfolk residents; rather they vote in a multimember district with the entire 307,951 population of Norfolk.

Senate

(a) Under the General Assembly's reapportionment plan for the Senate, Virginia Beach was allotted one senator for 116,528 of its citizens (the 8th Senatorial District). Of the remaining Virginia Beach citizens, 40,195 vote for one senator with 75,764 citizens of Norfolk, a total of 115,959 (the 7th Senatorial District), and 15,383 vote for one senator with 7,111 citizens of Nansemond County and the 89,580 citizens of the City of Chesapeake, a total of 112,074 (the 14th Senatorial District). The City of Norfolk was divided into three single-member senatorial districts: the 5th (population 116,084), the 6th (population 116,103) and the 7th (population 115,959, comprising 75,764 citizens of Norfolk and 40,195 citizens of Virginia Beach).

(b) The District Court did not alter any senatorial district boundaries. It did, however, consolidate the 5th, 6th and 7th Senatorial Districts into one multimember district in which three senators are to be elected at large. This consolidation was to compensate for the exaggerated population of the 5th District caused by counting 36,693 naval personnel at the homeport of their assigned vessels—the Norfolk Naval Station—which is located entirely within the 5th Senatorial District. At least 18,000 of those stationed at the Naval Station allegedly live outside of the 5th Senatorial District. (App. 100). Consolidation of the 5th, 6th and 7th Districts was to spread the disruptive effect of the naval personnel in the 5th District throughout the three

districts. Further, as a result of the consolidation the 40,195 citizens of Virginia Beach who would have voted for one senator with 75,764 citizens of Norfolk under the General Assembly's plan now vote for three senators with 307,951 citizens of Norfolk.

SUMMARY OF ARGUMENT

In judging the constitutionality of Virginia's plan strictly on mathematical grounds and totally ignoring the distinction between congressional redistricting and state reapportionment, the District Court clearly erred. Virginia's plan does not submerge population as the controlling criterion and the slight deviation[3] in its plan for the House of Delegates is fully justified by the State's traditional policy of respecting political subdivision boundaries in order to give a voice to political subdivisions. This policy is a recognized justification for some deviation in state reapportionment; the contrary authority relied upon by the District Court is, for valid reasons, applicable only to congressional redistricting. Moreover, in preparing its own plan the District Court violated significant judicial standards. The court's plan contains too much deviation to satisfy the standards relating to congressional redistricting, and it irrationally and invidiously discriminates against certain political subdivisions, notably Virginia Beach, in violation of the Equal Protection Clause. Further, in unnecessarily preempting the General Assembly's right to prepare a constitutionally acceptable plan and in giving no one an opportunity to ques-

[3] "Deviation" will be used to signify percentage deviation from the population norm per delegate (the norm for the Virginia House of Delegates is 46,485 and the Senate norm is 116,212). "Variation" is the total of the maximum deviation above (underrepresentation) and below (overrepresentation) the norm.

tion the validity of its plan, the District Court abused its equitable powers and violated the most fundamental principle of due process.

ARGUMENT

I.

There Is A Significant Distinction Between State And Congressional Reapportionment.

A.

The District Court Used The Wrong Test In Reviewing The General Assembly's Plan.

While state and congressional reapportionment present the same fundamental principle—equal representation for equal numbers of people—they present quite different constitutional considerations and problems. The District Court ignored this distinction. In striking down the General Assembly's plan the court cited two congressional cases, *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), and *Wells* v. *Rockefeller,* 394 U.S. 542 (1969), and the leading state case, *Reynolds* v. *Sims,* 377 U.S. 533 (1964), as if they required the same result.[4]

The District Court erroneously relied on the unequivocal mathematical standard set down in *Kirkpatrick*—"a good-faith effort to achieve absolute equality." 330 F. Supp. at 1147-48. There was no analysis of the General Assembly's House plan—only an observation that one district was over-

[4] Although the District Court's opinion was not handed down until July 2, 1971, and relied heavily upon *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971), decided June 7, 1971, for its holding regarding multimember districts, the District Court did not even mention *Abate* v. *Mundt,* 403 U.S. 182 (1971), also decided on June 7, 1971, which was this Court's most recent application of the Equal Protection Clause to reapportionment.

represented by 6.8% while another was underrepresented by 9.6%. "This variation," said the court, "is sufficient to condemn the plan." 330 F. Supp. at 1140.

B.

THE STANDARDS APPLICABLE TO STATE REAPPORTIONMENT ARE SET FORTH IN REYNOLDS v. SIMS.

In *Wesberry* v. *Sanders,* 376 U.S. 1 (1964), the Court held that, construed in its historical context, Article 1, § 2 of the Constitution requires that representatives be chosen from congressional districts that are equal in population "as nearly as is practicable." 376 U.S. at 7-8. Four months later, when state reapportionment was first decided on the merits in *Reynolds,* the Court held that equality of representation was also required under the Equal Protection Clause of the Fourteenth Amendment.[5] Although *Wesberry* was not "wholly inapposite", it was not dispositive of the *Reynolds* decision since it was "based on different constitutional considerations and [was] addressed to rather distinct problems." 377 U.S. at 560. Population remained the overriding objective, but the Court realized there were many considerations involved in state reapportionment cases that were not involved in congressional redistricting. The problem was to ascertain "whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures." 377 U.S. at 561.

The Court found two "legitimate considerations incident to the effectuation of a rational state policy" that justify

[5] The stated purpose of the Court's opinion in *Reynolds* was to determine the basic standards and state the applicable guidelines for implementing the decision in *Baker* v. *Carr,* 369 U.S. 186 (1962). *Baker* established the justiciability of questions of state reapportionment; the justiciability of questions of congressional redistricting had long before been settled—in 1932. See *Baker,* 369 U.S. at 232.

departure from equality in addition to the one consideration noted in *Wesberry*. 377 U.S. at 579. In *Wesberry*, the Court had recognized the practical impossibility of arranging congressional districts so that all would be mathematically equal. 376 U.S. at 18. The Court in *Reynolds* saw the applicability of this consideration to state reapportionment. Refusing to elaborate, the Court stated only that practical impossibility would be judged on a case-by-case basis against the standard of "an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." 377 U.S. at 577.

Of the two new considerations cognizable only in state reapportionment, one is a state's right to utilize, insofar as possible, political subdivision boundaries in drawing legislative districts and to provide for compact districts of contiguous areas in an effort to avoid partisan gerrymandering. 377 U.S. at 578-79. The second is "that of insuring some voice to political subdivisions, as political subdivisions." 377 U.S. at 580.

Since *Reynolds*, there have been only two full-dress opinions of this Court dealing with matters of state reapportionment (other than the validity of multimember districts), *Swann* v. *Adams*, 385 U.S. 440 (1967), and *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967). Neither added to nor subtracted from the standards established in *Reynolds*. Florida made no attempt to justify the deviations in its plan struck down in *Swann*. The justification for the deviation in the Texas plan held unconstitutional in *Kilgarlin* was no more than an afterthought and more imaginary than real. Judged solely on the standard of practical impossibility, both plans were clearly unconstitutional. These cases give no guidance how states should reapportion their legisla-

tures; they only provide a lesson in how *not* to reapportion. Both cases are entirely consistent with *Reynolds*.

Recently, in *Abate* v. *Mundt*, 403 U.S. 182 (1971), this Court approved a plan for local reapportionment where deviations from mathematical equality were justified by legitimate policy. Like state reapportionment, local reapportionment is tested under the Equal Protection Clause and the standards laid down in *Reynolds*. In order to give a voice on its governing body to each town, Rockland County, New York (population 218,804), had devised an apportionment plan whereby the smallest of five towns was given one representative and the others from two to six representatives on a proportionate basis. The mathematics of this plan worked well; the total variation in population per representative between the most underrepresented and the most overrepresented town was only 11.9%. This Court found that this slight departure from mathematical equality was justified on the authority of *Reynolds*.

Nevertheless, it has never been necessary for this Court to apply the policy considerations of *Reynolds* in a case of state reapportionment. In each state case (until the instant one) the deviations have been unjustified and so pronounced that they could not have been the product of a good faith effort to achieve equality as nearly as is practicable. Thus, this Court has never confronted the question raised by *Reynolds:* At what point does deviation necessitated by giving a legislative voice to political subdivisions become so large that it submerges population as the controlling criterion?

The District Court below apparently believed the answer to this question lies in eliminating the question altogether on the authority of *Kirkpatrick* and *Wells*. However, the court overlooked the distinction continuously made by this Court between congressional redistricting and state re-

apportionment, a distinction that has been blurred by the extreme deviations in the state plans reviewed by this Court. When faced in *Abate* with a plan devoid of such extremes, this Court reaffirmed *Reynolds* in the context of local reapportionment. The issue of local reapportionment in *Abate* is analogous to state reapportionment, but not to congressional redistricting. The instant case presents this Court with the opportunity to reaffirm *Reynolds* in the context of state reapportionment and to place *Kirkpatrick* and *Wells* in their proper perspective. Unless *Reynolds* is overruled, it remains the test of constitutionality in state reapportionment.

C.

NO POLICY CONSIDERATIONS JUSTIFY DEPARTURE FROM MATHEMATICAL EQUALITY IN CONGRESSIONAL REDISTRICTING.

Kirkpatrick and *Wells* demonstrate how different the result can be in applying *Wesberry* rather than *Reynolds*. In *Kirkpatrick*, Missouri's congressional redistricting plan with districts deviating from 2.84% below the norm to 3.13% above was declared unconstitutional. The New York congressional redistricting plan held unconstitutional in *Wells* contained deviations of plus 6.5% to minus 6.6%. The total variation in the apportionment plan approved in *Abate* (11.9%) was substantially greater than that disapproved in *Kirkpatrick* (5.97%) and only slightly less than that disapproved in *Wells* (13.1%). But contrary to the decision in *Abate*, this Court said in *Kirkpatrick:*

> "Similarly, we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries." 394 U.S. at 533-34.

Kirkpatrick and *Wells* are significant in two respects. They reject *for congressional redistricting* the two policy considerations announced in *Reynolds* that justify deviation from precise mathematical equality. The decisions also narrow the scope of the third consideration—that some departure from exact equality may be permitted due to the practical impossibility of achieving perfect equality. The Court said that "it is simply inconceivable" that congressional district lines could not be drawn to avoid a 5.97% variation between the most and least populated districts in Missouri. 394 U.S. at 532. It is now clear that in congressional redistricting (and perhaps in reapportionment of a state which does not have a policy of respecting political subdivision lines) the only constitutionally permissible deviations are those that result in spite of "a good-faith effort to achieve precise mathematical equality." 394 U.S. at 530-31. While *Kirkpatrick* and *Wells* clarify the standard set in *Wesberry,* they do not change it; population alone has always been the sole criterion of constitutionality in congressional redistricting.

D.

UNDER THE AMERICAN THEORY OF REPRESENTATIVE GOVERNMENT THERE IS NO NEXUS BETWEEN CONGRESSIONAL DISTRICTS AND STATE POLITICAL SUBDIVISIONS.

In *Kirkpatrick,* this Court understandably rejected Missouri's argument that deviation in congressional redistricting may be justified by a state's policy of avoiding fragmentation of political subdivisions. Representatives in Congress play no part in the state legislative process. Instead of representing political subdivisions, they serve to provide each voter with a voice in the making of national policy. Consequently, population is the only factor that has any

importance in arranging for each individual's voice to be heard through his representative. This point was recognized in the Virginia plan of representation presented to the Constitutional Convention in 1787 which called for representation in both houses of Congress based on population. Considerable controversy arose over this proposal because the smaller states feared domination by the larger. A compromise was later reached whereby the House of Representatives would represent the people on the basis of equality of population while the Senate would represent the varying interests of the States on the basis of equality among them. From its conception, then, the House of Representatives was national in scope.

As this Court noted in *Wesberry,* for the first 50 years of our nation's history at-large elections for the House of Representatives was a common practice. 376 U.S. at 8. Districting was originally made uniform by statute in 1842 in order to provide citizens with a specific representative in Congress and to facilitate communication between each representative and his constituency. See Paschal, *The House of Representatives: "Grand Depository of the Democratic Principle"?,* 17 Law & Contemp. Prob. 276 (1952). Districting was not designed to provide for varying local interests. In *Reynolds,* this Court held the federal analogy inapposite to Alabama's attempted justification for submerging population as a basis for apportioning one house of its legislature. 377 U.S. at 575. Likewise, the federal analogy is inapposite to determining whether a state has made a "good faith effort" to make districts "as nearly of equal population as is practicable." In short, although "practical impossibility" is the only justification for departure from absolute equality in congressional redistricting, this should in no way vitiate valid policy considerations justifying such departures in state reapportionment.

Moreover, merely as a practical matter, it is considerably easier to achieve population equality among congressional districts than among state legislative districts. The Minnesota District Court, as noted in *Sixty-Seventh Minnesota State Senate* v. *Beens,* 40 U.S.L.W. 3525, 3526 (U.S. Apr. 29, 1972), found that the larger the population of a district, the easier it is to achieve equality. And in terms of percentages, the smaller the population of a district, the more pronounced become the deviations from perfect equality.

E.

THE STATE POLICY CONSIDERATIONS RECOGNIZED IN REYNOLDS SHOULD PLAY AN IMPORTANT PART IN STATE REAPPORTIONMENT.

In *Reynolds,* the Court recognized that in the area of state reapportionment there are matters of policy which a state itself may determine. In *Beens,* the Court reaffirmed this, holding that the number of members in a state legislature is solely a matter of state policy. "Size is for the State to determine in the exercise of its wisdom and in the light of its awareness of the needs and desires of its people." 40 U.S.L.W. at 3527. And in *Grivetti* v. *Illinois State Electoral Board,* 335 F. Supp. 779 (N.D. Ill. 1971), *aff'd mem.,* 40 U.S.L.W. 3537 (U.S. May 15, 1972), the District Court approved Illinois' policy of completely ignoring county and municipal boundaries in reapportioning the State.

Nevertheless, when a state has adopted a policy of giving some voice to political subdivisions and has traditionally and consistently maintained this policy, implementation of the policy should be permitted so long as population remains the overriding consideration. There are strong reasons to support such a conclusion. State legislators play a significant role in local political processes. Virginia, and many other states, delegate essential governmental functions to

political subdivisions. And the powers they exercise are established, modified and removed by the states' legislatures. Thus, these states have a legitimate interest in providing a representative voice in their legislatures for political subdivisions. How else can the legislature be advised of what the people want in terms of local government? A legislature elected without regard for the representation of political subdivisions can, of course, pass upon matters of local government. But are its actions likely to be responsive to the will of the people directly affected? In Virginia, a policy in this regard was established in 1776 in its Declaration of Rights now embodied in Article I, § 6 of the Virginia Constitution:

> "That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, *the community,* have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, *or bound by any law to which they have not, in like manner, assented for the public good.*" (emphasis added).

The conclusion that political boundaries are relevant factors in reapportioning a state so as to give political subdivisions a voice is the very essence of *Reynolds.* If *Reynolds* and its companion cases mean no more than *Wesberry,* one might ask why they comprise 233 pages of the Supreme Court Reports. As Chief Justice Warren said in *Reynolds:*

> "In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular subdivisions. And a State may legitimately desire to construct dis-

tricts along political subdivision lines to deter the possibilities of gerrymandering." 377 U.S. at 580-81.

II.

Tested Under The Proper Standard, The General Assembly's Plan Is Constitutional.

A.

Virginia's Policy Was To Use Population As The Primary Criterion And To Give Political Subdivisions A Voice In One House.

The General Assembly followed Article II, § 6 of the Virginia Constitution in preparing its reapportionment plan:

> "Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district."

In reapportioning the Senate, the General Assembly eschewed its traditional practice of maintaining the integrity of political boundaries and followed a policy of single member districts. It used city and county boundaries only as a frame of reference and did not hesitate to cross these boundaries in the pursuit of population equality. Virginia Beach provides an excellent example. One senatorial district is located completely within its boundaries, a second is made up of parts of Virginia Beach and Nansemond County and all of the City of Chesapeake, and a third is made up of parts of Virginia Beach and Norfolk. The District Court found no mathematical infirmity in this plan.

In reapportioning the House of Delegates, however, the General Assembly followed the State's long-standing tradition of respecting political subdivision lines in order to

give cities and counties some voice in the legislature. This tradition was recognized in *Davis* v. *Mann*, 377 U.S. 678, 686 (1964):

> "Because cities and counties have consistently not been split or divided for purpose of legislative representation, multimember districts have been utilized for cities and counties whose populations entitle them to more than a single representative, resulting in there always being less than 100 delegate districts and less than 40 senatorial districts. And because of a tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines, districts have been constructed only of combinations of counties and cities and not by pieces of them."

Even respecting political subdivision boundary lines, the General Assembly came extremely close to the mathematical ideal by utilizing floater districts in some instances and multimember districts in others. The District Court looked only at the total variation of 16.4%. 330 F. Supp. at 1139. But 35 House districts were within 4% of the ideal of 46,485 persons per delegate, and only two exceeded this norm by more than 8%. The average deviation from the norm was only 3.9%. The ratio between the largest and smallest House districts was 1.18-to-1. Theoretically, 49.3% of the population of Virginia could elect a majority of 51 delegates in the House. (App. 77). This figure is within 1.7% of perfection.

The District Court seemingly acknowledged that the General Assembly's plan came as close to mathematical equality as possible while preserving the integrity of political subdivision lines. 330 F. Supp. at 1140. And most significantly, no one has brought forward a plan demonstrating that a higher degree of equality could be attained while preserving political subdivision lines.

B.

VIRGINIA'S PLAN IS IN MARKED CONTRAST WITH THOSE INVALIDATED IN OTHER CASES.

This Court has never invalidated a state reapportionment plan with such a tight adherence to population equality. All of the plans under review in 1964 were characterized by extreme inequality and irrational discrimination against certain voters. Nor did *Swann* and *Kilgarlin* shed any light on the degree of population equality required by the Equal Protection Clause. There the Court held only that variations of 25.65%, 33.55%, and 26.48% were not unavoidable. Since there was no attempt in *Swann* and only a spurious one in *Kilgarlin* to justify the variations on the basis of the policy considerations recognized in *Reynolds*, the plans were found unconstitutional.

Unlike the instant case, an alternative plan was presented in *Kilgarlin* to show that greater equality could have been achieved even while maintaining the integrity of political subdivision lines. But in neither *Swann* nor *Kilgarlin* did this Court come to grips with whether such large variations could be justified. Consequently, these cases do not begin to decide whether a plan with a variation as low as 16.4%, much less one that is fully justifiable, provides for equality "as nearly as is practicable."

C.

VIRGINIA'S PLAN SHOULD BE JUDGED ON ITS MERITS, NOT ITS MATHEMATICS.

Virginia's House plan is not unconstitutional simply because one district is overrepresented by 6.8% while another is underrepresented by 9.6%. The District Court's holding to the contrary is not supported by any decision of this Court. The Court has never disapproved a state plan with

a total variation figure even approaching the 16.4% figure in Virginia's plan. And the cases all hold in no uncertain terms that a reapportionment plan cannot be judged on the basis of pure mathematics. In *Reynolds* this Court stated that permissible deviation in one state may be unsatisfactory in another "depending on the particular circumstances of the case." 377 U.S. at 578. And in *Swann* it is made even clearer that the mathematics of one plan has little bearing on another:

> "In any event, the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State." 385 U.S. at 445.

The error in applying pure mathematics to state reapportionment can be seen through a comparison with congressional redistricting. The number of constituents of a representative in Congress does not vary substantially from state to state and congressional districts are of the same approximate size throughout the United States. Since population is the sole criterion of equality in congressional redistricting, and there are no constitutionally cognizable policy considerations which a particular state may use to justify deviations from equality, a certain deviation held impermissible in one state has considerable relevance to what is impermissible in another.

This is not true in state reapportionment. The number of seats in a state legislature varies from state to state. A state with a relatively large legislature would probably have a large number of districts and mathematical equality would therefore be more difficult. See *Sixty-Seventh Minnesota State Senate* v. *Beens,* 40 U.S.L.W. 3525, 3526 (U.S. Apr. 29, 1972). For example, New Hampshire only has to draw one line dividing the state into two equal parts for congres-

sional redistricting. But it has to draw lines to accommodate 400 representatives for purposes of state reapportionment. Moreover, in state reapportionment the policy considerations recognized in *Reynolds* may justify deviation in certain states while not in others. Consequently, a state reapportionment plan must be judged in light of state policy and cannot be tested for compliance with the Equal Protection Clause merely by comparing its percentage deviation figures with those of another plan disapproved by this Court.

D.

RATIONAL STATE POLICY CONSIDERATIONS FULLY JUSTIFY THE DEVIATION.

In its singular concern for arithmetic perfection, the District Court ignored factors which justify the slight deviation in Virginia's House plan. While traditionally regarding population as the most important factor in reapportionment, Virginia has historically maintained the integrity of political subdivision lines in both houses of its legislature. *Davis* v. *Mann, supra* at 19. Moreover, Virginia is not a state which has a history of recalcitrance in matters of reapportionment. The General Assembly reapportioned itself in 1932, 1942, 1952, and 1962 and again in 1964 after its 1962 plan was declared unconstitutional.

Virginia's House plan was not prepared by a woefully malapportioned legislature, but by one elected under a judicially approved plan. *Mann* v. *Davis,* 245 F. Supp. 241 (E.D. Va.), *aff'd mem. sub. nom. Burnett* v. *Davis,* 382 U.S. 42 (1965). The plan was prepared by a representative legislature, not one controlled by rural interests or one that favored one area of the State over another.

The General Assembly's plan is also rational. It contains none of the "crazy quilts" that characterized its 1962 plan. See *Davis* v. *Mann,* 377 U.S. 678, 691 (1964). There is no

unexplainable discrimination against certain areas of the State. Multimember and floater districts were used in a logical manner to avoid crossing political subdivision lines, not intentionally to dilute the voting power of any minority interest groups. The District Court itself recognized that the circumstances of the case "permit the utilization of multi-member districts." 330 F. Supp. at 1146.

Notwithstanding the District Court's conclusory finding that "[t]he state has proved no governmental necessity for strictly adhering to political subdivision lines" (330 F. Supp. at 1140), the reason is perfectly clear. It was recognized in *Reynolds* "that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature." 377 U.S. at 580. This consideration is directly relevant to the government of Virginia. Schools, tax assessment and collection, police and fire protection, water and sewer services and recreational facilities are examples of governmental services provided by cities and counties in Virginia. Political subdivisions in Virginia also have legislative powers in such matters as zoning and civil and criminal ordinances of local application. Virginia is unique in that cities are autonomous political entities functioning entirely apart from counties. The powers exercised by a city or county in Virginia are established, modified or removed by the General Assembly. See *Va. Const.* art. 4, §§ 2 and 3. Yet these factors were completely ignored by the District Court.

The District Court attempted to justify its finding of "no governmental necessity" on the ground that the plan did not consistently maintain the integrity of political subdivision lines. The one instance noted was that of Fairfax County, by far the largest political subdivision in the State (population 455,021), which was divided into two multimember districts. But there is no inconsistency here. The

boundary of Fairfax County was not crossed. Instead of the entire county voting for ten delegates, the General Assembly divided it into two districts (18th and 19th) with five delegates apiece. This was reasonable if only to permit better voter identification with candidates.

Virginia's House plan, in the particular governmental context of Virginia, is constitutional under the standards laid down in *Reynolds*. The State's policy of preserving the integrity of political subdivisions so as to give them a voice does not unconstitutionally infringe upon the equality principle of the Equal Protection Clause. And it provides for making local government more responsive to the people while preventing the political gerrymandering of almost ludicrous proportions that has taken place in some states in the name of "equal representation for equal population."[6] Certainly the State's policy was worth the 6.1% difference in total variation between the General Assembly's plan and that prepared by the District Court.[7]

III.

The District Court's Plan Is Unconstitutional Under State Or Congressional Standards.

A.

The District Court Upset The Carefully Drawn Balance Of Representation In Virginia's Plan.

The House plan prepared by the District Court as a substitute for the General Assembly's plan is a hastily prepared patchwork measure. District lines in the General Assembly's

[6] O'Rourke, *Reapportionment: Law, Politics, Computers* 68-69 (American Enterprise Institute for Public Policy Research, Domestic Affairs Study 1, February, 1972).

[7] Total variation was 16.4% under the General Assembly's plan and 10.3% under the District Court's plan.

plan were simply shifted here and there in an attempt to achieve the absolute mathematical equality required by *Kirkpatrick*. At the same time the court attempted to preserve "the clear preference of the Assembly to adopt recognized political subdivision lines in apportioning delegates." 330 F. Supp. at 1140. The District Court achieved neither of these objectives.

The court failed to realize that Virginia's House plan was a carefully drawn balance of the various interests of the State's political subdivisions. Cities and counties were given representation in substantial proportion to their population. This was not easily accomplished. The General Assembly could not give each city or county a separate voice since this would clearly subvert the equal population principle. *Reynolds*, 377 U.S. at 581. And in only a few instances did the population of a political subdivision correspond with the ideal number necessary to support a particular number of delegates. Consequently, the General Assembly had to use a complex combination of single, multimember and floater districts to achieve a synthesis of equality of representation among political subdivisions and the overriding consideration—population equality.

By merely tampering with the General Assembly's plan for the sole purpose of achieving greater population equality, the District Court destroyed the representational balance struck by the General Assembly. The court extended single and multimember districts across political subdivision lines in some twelve instances. In every instance, the political subdivision which lost *population* did not receive any *represensentation* in return. A prime example is Scott County. Under the General Assembly's plan this county of 24,376 people voted in the 1st District for 2 delegates with the 76,346 population of Dickinson, Lee and Wise Counties. Because the 1st District was underrepresented, the District Court

transferred 6,063 people from Scott County to the 2nd District to vote for 2 delegates with 87,041 people from the City of Bristol and Smyth and Washington Counties. As a result, Scott County has a substantially smaller voice in the 1st District and virtually no voice in the 2nd District.

The plight of Scott County is shared by the Counties of Wythe, Albemarle, Charlotte, Prince William, Rockingham, Dinwiddie, Amelia and Essex and the Cities of Chesapeake and Virginia Beach. Each has lost a certain degree of representation and received nothing in return.

The problem exists only because the District Court tried to adhere to the General Assembly's policy of respecting political subdivisions while applying congressional standards. Cities and counties still have a voice in the House of Delegates, but under the court's plan some have a disproportionately smaller voice than others. Since representation under the court's plan is not equal, the plan violates the fundamental principle of equal protection in reapportionment. *Reynolds,* 377 U.S. at 560-61. Under the Equal Protection Clause equality means equality of representation, not equality of numbers. The fact that equality of numbers may be synonymous with equal representation in congressional redistricting is irrelevant.

B.

THE DISTRICT COURT'S DISCRIMINATION AGAINST VIRGINIA BEACH IS INVIDIOUS AND IRRATIONAL.

The District Court's plan discriminates against several cities and counties, but none more drastically than Virginia Beach. Under the General Assembly's plan, Virginia Beach constituted the 40th House District and was allocated three delegates for its 1970 population of 172,106. Since one dele-

gate should ideally represent 46,485 citizens, the General Assembly cured the resulting underrepresentation of 32,651 by providing a floater delegate for the 42nd District composed of the cities of Virginia Beach, Portsmouth and Chesapeake. The resulting deviation for Virginia Beach was plus 0.2%.[8]

The District Court left Virginia Beach with the 40th District and its three delegates, abolished the 42nd District and transferred its floater delegate to Northern Virginia. It then disposed of 3,515 of the remaining 32,651 by adding them to the ideal population (3 x 46,485, or 139,455) of the 40th District. This resulted in the 40th District being underrepresented by 2.5%. 330 F. Supp. at 1144. The remaining 29,136 were transferred to the City of Norfolk to vote in the multimember 39th House District with the entire Norfolk population of 307,951.

Political realities insure that the seven at-large delegates who are elected from Norfolk's 39th House District will speak in the General Assembly for the 91.4% of their constituents who reside in Norfolk while the 8.6% who reside in Virginia Beach will be ignored. No Virginia Beach citizen was among the seven delegates elected from the 39th House District in 1971 and, as a matter of practical politics, none ever will be. In terms of their representation in the General Assembly in matters of local government, these 29,136 residents of Virginia Beach have been effectively disenfranchized. Their schools, police and fire protection, water and sewer services and the multitude of other governmental

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[8] Under one method of calculating deviation in floater districts, Virginia Beach was underrepresented by 7.3% under the General Assembly's plan. *Howell* v. *Mahan*, 330 F.Supp. at 1144 n. 4. However the calculation is done, there is no question that Virginia Beach has less *representation* under the District Court's plan than under the General Assembly's plan.

services provided by their local government do not come from Norfolk. They are not taxed by Norfolk. Yet the delegates for whom they are entitled to vote speak for Norfolk alone in all these matters.

Not only has the District Court denied representation to these 29,136, it has discriminated against all citizens of Virginia Beach. These citizens have a common interest in their local government and its particular problems which they do not share with other voters of the State. Virginia Beach has a tremendous land area (312 square miles) and contains a heterogeneous mix of urban, suburban and rural areas. See *Dusch* v. *Davis,* 387 U.S. 112 (1967). Its unique and diverse problems can be solved only with the assistance and intervention of the State.

In the many matters relating to local government, the political subdivisions are the constituencies of the Virginia House of Delegates. The laws relating to local government introduced and enacted in the House of Delegates govern them directly. Since the interests of Virginia Beach are not the same as the Cities of Norfolk or Roanoke or Fairfax County, the legislature must resolve the many conflicts between political subdivisions that arise over legislative proposals. In terms of political influence in the House, the population of Virginia Beach is 139,455. Yet its actual population is 172,106. In terms of *representation* Virginia Beach is underrepresented by 23.4% since the three delegates elected from Virginia Beach's 40th District are the only ones who represent the common and unique interests of its 172,106 citizens.

Even assuming that the District Court was correct in focusing entirely on numbers to the point of totally ignoring representation, the manner in which it resolved the numbers problem in Virginia Beach is a classic example of an irrational "crazy quilt." The District Court transferred

29,136 Virginia Beach citizens to Norfolk's seven member 39th District to resolve the overpopulation in Virginia Beach. Substantially the same degree of deviation would have resulted had the District Court transferred one delegate and 10,000 fewer citizens from Norfolk's 39th District to Virginia Beach's 40th District.[9] The action of the District Court in transferring 10,000 more citizens than necessary is illogical and totally indefensible.

The irrationality of the District Court's action might be dismissed as blind inadvertence were it not for two other considerations. The first is the court's misuse of population figures. It transferred one delegate to Fairfax County from the Tidewater area because three districts in Tidewater were slightly (4.8%) overrepresented while three districts in Northern Virginia were slightly (5.4%) underrepresented. 330 F. Supp. at 1145-46. The court pointed to the remarkable past and projected population growth of Northern Virginia as compared to that of Norfolk as justification for this transfer. 330 F. Supp. at 1146. But it was Virginia Beach, not Norfolk, that paid the price for this transfer. Norfolk has the same number of delegates under both plans while Virginia Beach lost a floater delegate which would have been responsive to its interests. Yet Virginia Beach was not overrepresented under the General Assembly's plan.[10] And more significantly, Virginia Beach has been, and is projected to continue to be, the second fastest grow-

[9] Under the District Court's plan Virginia Beach's 40th House District is underrepresented by 2.5% while Norfolk's 39th District is underrepresented by 3.6%. The transfer of one delegate and 19,000 citizens from the 39th District to the 40th would increase the underrepresentation in Virginia Beach slightly (from 2.5% to 2.8%), but Norfolk's underrepresentation would have remained at 3.6%.

[10] Depending on how deviation is calculated with reference to the floater district, Virginia Beach was underrepresented by 0.2% or 7.3% under the General Assembly's plan. 330 F.Supp. at 1144 & n. 4.

ing political subdivision in the State.[11] Total population increased from 85,218 in 1960 to 172,106 in 1970, a ten year increase of over 100%. Current projections indicate that by 1980 the population of Virginia Beach will exceed 275,000, yet in 1980 the City will still be represented by three delegates. The failure to consider this dramatic growth trend and the resulting overrepresentation of Norfolk to the extreme detriment of Virginia Beach was clearly erroneous. As this Court stated in *Kirkpatrick*, findings as to population trends must be "applied throughout the State in a systematic, not an *ad hoc* manner." 394 U.S. at 535.

A second factor ignored by the District Court makes the transfer of 29,136 citizens to Norfolk intolerable. Under the court's plan, Norfolk's 5th and 6th Senatorial Districts are consolidated with the 7th Senatorial District, made up of 40,195 Virginia Beach citizens and 75,764 Norfolk citizens, into one large multimember district with a population of 348,146. As a result, the 40,195 citizens of Virginia Beach who would have voted for one senator with 75,764 citizens of Norfolk must vote for three senators with the 307,951 citizens of Norfolk. Before consolidation the 40,195 citizens of Virginia Beach had a voice in the outcome of the election of one senator—now they have *no* voice whatsoever.[12] As in the District Court's House plan, Virginia Beach citizens provide the numbers necessary to give Norfolk added Senate representation but get nothing in return.

Norfolk, which is entitled to proportionate representation of 6.6 delegates and 2.6 senators, is effectively represented by 7 delegates and 3 senators under the District Court's plan while Virginia Beach, which is entitled to proportionate

[11] Deposition of Robert Griffis, at 30 (Norfolk Ex. 1; R. ....)

[12] As was true for the 39th House District, all Senators elected from the consolidated 5th, 6th and 7th Senatorial Districts in 1971 were residents of Norfolk.

representation of 3.7 delegates and 1.5 senators, is represented by only 3 delegates and 1 senator. The cumulative effect of underrepresentation in both houses infringes upon the Fourteenth Amendment rights of Virginia Beach citizens to an equal voice in the General Assembly. This Court has made it perfectly clear that the *overall effect* of representation in both houses must be consistent with the equal representation principle.

> "[I]n reviewing a state legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature." *Maryland Committee* v. *Tawes*, 377 U.S. 656, 673 (1964); *accord, Burns* v. *Richardson*, 384 U.S. 73, 83 (1966).

The discrimination against Virginia Beach results from substantial numbers of its citizens being placed in large multimember districts in both houses of Virginia's bicameral legislature. This Court has recognized the invidious effect of large multimember districts used in both houses:

> "Such a tendency, we have said, is enhanced when the district is large and elects a substantial proportion of the seats in either house of a bicameral legislature, if it is multi-member for both houses of the legislature or if it lacks provision for at-large candidates running from particular geographic subdistricts, as in

Fortson." Whitcomb v. *Chavis,* 403 U.S. 124, 143-44 (1971).[13]

C.

EVEN UNDER ITS OWN STANDARDS, THE DISTRICT COURT'S PLAN IS UNCONSTITUTIONAL.

If the constitutionality of state reapportionment is now to be tested under congressional standards, the District Court's plan is no more constitutional than that prepared by the General Assembly. The court's plan with a total variance of 10.3% contains much more inequality than the congressional plan held unconstitutional in *Kirkpatrick.* Such a variation is clearly not *de minimus:*

> "We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimus* and to satisfy without question the 'as nearly as practicable' standard." *Kirkpatrick,* 394 U.S. at 530.

Nor can a variation as large as 10.3% be justified as "a good faith effort to achieve precise mathematical equality." Simply because a court, rather than a legislature, says that it made such an effort (330 F. Supp. at 1147) does not make it so. The District Court's plan is simply a makeshift modification of the General Assembly's plan. Twenty-six of the 52 House districts were unaltered. More equality could have been achieved simply by ignoring political subdivision lines entirely. Under congressional standards maintenance of political boundary lines is no justification for inequality. *Kirkpatrick, supra* at 13.

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[13] The horrible prospect of attempting to give a voice to all interest groups, recognized in *Whitcomb* (403 U.S. at 156-57), is avoided under the General Assembly's policy of recognizing only one interest group—the political subdivision.

Likewise, the geographical consideration which the District Court used to justify the 6.5% deviation in the 46th District, which consists of the remote Eastern Shore of Virginia, is not recognized under congressional standards. *Kirkpatrick*, 394 U.S. at 536.

Finally, a total variation of 10.3% is simply too much inequality among districts to be justified on the basis of the "as near as practicable" standard. The District Court could have done better—all it needed was the census tracts and an adding machine. Speaking of the Missouri plan with a total variance of 5.97%, this Court said:

> "Finally, it is simply inconceivable that population disparities of the *magnitude* found in the Missouri plan were unavoidable." 394 U.S. at 532 (emphasis added).

IV.

The District Court Abused Its Discretion.

Assuming that the District Court correctly held the General Assembly's plan unconstitutional and that the District Court's plan is constitutional, this Court must nevertheless reverse the interlocutory order of the District Court dated July 2, 1971. The manner in which the District Court exercised its remedial powers exceeded its judicial power and violated all of the fundamental principles of due process.

A.

The District Court Preempted The Legislative Function.

Once a court has held a state's reapportionment plan unconstitutional, the court must take appropriate action to rectify the situation on the basis of "the well-known principles of equity." *Reynolds*, 377 U.S. at 585. Traditionally this has meant referring the defective plan back to the legislature. *See e.g., Scott* v. *Germano*, 381 U.S. 407, 409

burg Board of Education, 402 U.S. 1, 15 (1971). But, as noted in *Whitcomb*, there are limits: "The remedial powers of an equity court must be adequate to the task, but they are not unlimited." 403 U.S. at 161.

In light of the General Assembly's clear ability and willingness to itself provide the necessary remedy, the District Court's refusal to refer the plan back to the General Assembly exceeded the limits of its powers and was a clear abuse of the equitable principles involved. To affirm the District Court's action would destroy any currency remaining in the announced principles of *Reynolds* that "reapportionment is primarily a matter for legislative consideration and determination." 377 U.S. at 586.

B.

THE ACTION OF THE DISTRICT COURT DENIED TO ALL CONCERNED THEIR "DAY IN COURT."

The District Court prepared its reapportionment plan without giving Virginia Beach, or anyone else, an opportunity to be heard on the merits of the plan. The failure to hold any hearing whatsoever is a clear violation of procedural due process. Moreover, it underscores the court's misuse of its equitable powers. It is axiomatic that "[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings." *Postal Telegraph Cable Co.* v. *Newport*, 247 U.S. 464, 476 (1918).

The absence of any hearing is especially invidious in the area of reapportionment since a court's plan is not subject to attack. The procedure followed by the District Court has foreclosed Virginia Beach from being heard on the constitutionality, or even the undesirability as a matter of policy, of the plan which, unless reversed here and now, will more than likely govern elections to Virginia's General Assembly for the next decade. The procedures followed be-

low stand in sharp contrast to those followed by the Louisiana District Court in *Taylor* v. *McKeithen*, 40 U.S.L.W. 3584, 3584-85 (U.S. June 12, 1972):

> "The special master held four days of hearings during which over 100 persons were heard. Proposed plans were received by him. No one was denied a hearing. He then submitted his recommendation to the District Court and after a hearing it was adopted by the court."

CONCLUSION

The judgment of the District Court declaring Virginia's reapportionment plan unconstitutional should be reversed and Virginia's plan for the reapportionment of the House of Delegates and Senate reinstated. In the alternative, the plan prepared by the District Court should be declared unconstitutional and the case remanded with directions that the General Assembly be permitted an opportunity to prepare a new reapportionment plan under meaningful standards determined by this Court, or the case should be remanded with directions that the case be reopened and the City of Virginia Beach be permitted an opportunity to be heard on the formation of a new reapportionment plan.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Harry Frazier, III, counsel for the Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief for the Appellant in the United States Mails, first class postage prepaid, this 30th day of June, 1972, addressed to:

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and by depositing one copy of the foregoing Brief for the Appellants in the United States Mails, first class postage prepaid, this 30th day of June, 1972, addressed to The Hon.

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